

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
SPRINGFIELD DIVISION

3:09-CV-10334-PBS

\* \* \* \* \*

GEOFFREY CROWTHER, \*  
Plaintiff \*  
v. \*  
CSX TRANSPORTATION, INC., \*  
and CONSOLIDATED RAIL CORP., \*  
Defendants \*

\* \* \* \* \*

DEPOSITION OF: DR. MARTIN J. LUBER  
OFFICES OF NEW ENGLAND ORTHOPEDIC SURGEONS  
300 Birnie Avenue  
Springfield, Massachusetts 01107  
May 24, 2010, 5:30 p.m.

Michele L. Mariani  
Certified Shorthand Reporter  
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2  
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1 (Deposition commenced at 5:26 p.m.)

2  
3 **DR. MARTIN LUBER, Deponent, Having first**  
4 **been duly identified and sworn, testifies and**  
5 **states as follows:**

## 8 EXAMINATION BY MS. GAMACHE:

10 Q. Good -- I guess it's afternoon --  
11 good afternoon, Dr. Luber. My name is Heather  
12 Gamache. We met briefly before going on the  
13 record. Have you been deposed before?

14 A. I have.

15 Q. So you're familiar with the  
16 procedure, questions back and forth. Wait until  
17 I finish the question before answering, and I'll  
18 do the same for you. If you need a break at any  
19 time, just let me know, that's fine. If at any  
20 time you don't understand a question I'm asking,  
21 just ask that I rephrase it, and I'd be happy to  
22 do so. If you answer a question, I'm going to  
23 presume that you knew or understood the question  
24 that was being asked.

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Page 4

## 1 I N D E X

2  
3  
4 **DEPONENT: DR. MARTIN J. LUBER**  
5  
6  
7 **EXAMINATION BY: PAGE:**  
8 **MS. GAMACHE 4**  
9  
10  
11 **EXHIBITS: PAGE:**  
12 **Exhibit 1, File .....6**  
13 **Exhibit 2, Notice of Deposition .....6**  
14 **Exhibit 3, CV of Dr. Luber .....6**  
15 **Exhibit 4, Narrative Report, 4/26/10 ....6**  
16 **Exhibit 5, CSX Job Description, 2 pgs. ..12**  
17 **Exhibit 6, Office Note, 2/26/07 .....28**  
18 **Exhibit 7, Office Note, 3/19/07 .....30**  
19  
20 **(Exhibit 1 retained by Dr. Luber.)**

1 A. Understood.

2 Q. Are you on any medications today  
3 that would compromise your ability to answer?

4 A. I am not.

5 Q. Okay. Did you bring your file with  
6 you today?

7 A. I have files from our office, yes.

8 Q. Okay. Is that something that --  
9 you can keep it, but something I'm going to mark  
10 just the entire thing as an exhibit, and then  
11 not alter it in any way from this point forward.

12 A. Okay, please.

13 Q. You can just mark the first page as  
14 Exhibit 1, and then you can keep it in front of  
15 you, and then just after the deposition, don't  
16 make any changes to it, just keep it as is.

17 A. Understood.

18 Q. In your possession in the event  
19 that this case goes to trial.

20 A. All right.

21 MS. GAMACHE: So we'll mark that as  
22 Exhibit 1.

23 Q. (By Ms. Gamache) And also, you  
24 received a notice of deposition, or Tom may have

Page 3

Page 5

1 received a notice of deposition.  
 2 A. I did.  
 3 MS. GAMACHE: I'm going to mark  
 4 that as Exhibit 2, and mark these up to  
 5 4.  
 6  
 7 (Exhibit 1, File, Marked.)  
 8  
 9 (Exhibit 2, Notice of Deposition,  
 10 Marked.)  
 11  
 12 (Exhibit 3, CV of Dr. Luber,  
 13 Marked.)  
 14  
 15 (Exhibit 4, Narrative Report,  
 16 4/26/10, Marked.)  
 17  
 18 Q. (By Ms. Gamache) Dr. Luber, I'm  
 19 going to hand you what has been marked as  
 20 Exhibit 3. It's your CV. If you can just take  
 21 a look at that and confirm whether it's an up to  
 22 date copy.  
 23 A. (Doctor looks over document.) It  
 24 is not completely up to date. There's an

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1 Q. What year did you graduate?  
 2 A. 1990.  
 3 Q. And where did you attend medical  
 4 school?  
 5 A. SUNY Upstate in Syracuse.  
 6 Q. And what year did you graduate?  
 7 A. 1994.  
 8 Q. And we were just talking about your  
 9 board certification. And you're board certified  
 10 in Sport's Medicine, and you received that in  
 11 2007, correct?  
 12 A. Correct.  
 13 Q. Are you board certified in any  
 14 other areas?  
 15 A. Orthopedic Surgery.  
 16 Q. When did you receive your board  
 17 certification in Orthopedic Surgery?  
 18 A. 2003.  
 19 Q. And both certifications are up to  
 20 date?  
 21 A. They are.  
 22 Q. Have you ever been suspended --  
 23 have your certifications ever been suspended in  
 24 any way?

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1 additional board certification.  
 2 Q. What board certification is that?  
 3 A. I'm board certified in Sport's  
 4 Medicine, and that was in 2007.  
 5 Q. If you could provide Mr. Joyce with  
 6 an updated copy of your CV, then he can get that  
 7 to me, that would be great.  
 8 A. I can do that.  
 9 Q. And what's been marked as Exhibit  
 10 4 is the narrative report you prepared?  
 11 A. In April of this year, yes.  
 12 Q. And that's an accurate copy of the  
 13 report you prepared?  
 14 A. Yes.  
 15 Q. Okay. Dr. Luber, what is your date  
 16 of birth?  
 17 A. March 16th, 1968.  
 18 Q. And what is -- the address here is?  
 19 A. 300 Birnie Avenue, Springfield.  
 20 Q. And that's the location of your  
 21 office, correct?  
 22 A. Correct.  
 23 Q. Where did you attend college?  
 24 A. Loyola University in Chicago.

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1 A. No.  
 2 Q. Altered?  
 3 A. No.  
 4 Q. Has any disciplinary action ever  
 5 been taken against you?  
 6 A. No.  
 7 Q. Okay. Have you authored any  
 8 papers or conducted any research?  
 9 A. I have. They're listed in my CV.  
 10 Q. Are any of them related to  
 11 repetitive stress injuries?  
 12 A. They are not.  
 13 Q. Is it your understanding that  
 14 you've been retained as an expert by Mr. Joyce  
 15 in this case?  
 16 A. I don't believe that I have been.  
 17 I believe I've been retained as a witness of  
 18 fact for the services I provided for  
 19 Mr. Crowther.  
 20 Q. Okay. So were you paid for your  
 21 narrative report?  
 22 A. I believe that I was, yes.  
 23 Q. Have you served as an expert  
 24 witness in the past?

Page 9

1 A. I have not.  
 2 Q. Have you testified in court before?  
 3 A. No.  
 4 Q. But you said you've given prior  
 5 depositions?  
 6 A. Yes.  
 7 Q. What were those in connection  
 8 with?  
 9 A. Care rendered to patients.  
 10 Q. On a fact witness basis?  
 11 A. Yes.  
 12 Q. Were they personal injury cases, or  
 13 medical malpractice cases, if you know?  
 14 A. Personal injury cases.  
 15 Q. Okay. Do you have any connection  
 16 to the railroad industry?  
 17 A. I do not.  
 18 Q. And referring back your report or  
 19 your narrative report, does your narrative  
 20 report contain all of your opinions with regard  
 21 to Mr. Crowther's condition?  
 22 A. It contains my opinion regarding  
 23 the injury that I treated him for regarding his  
 24 left elbow.

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1 related to Mr. Crowther's job duties at the  
 2 railroad?  
 3 A. I did.  
 4 Q. What documents did you review?  
 5 A. I had a listing of the job  
 6 description that he provided for or while on the  
 7 job at the railroad.  
 8 Q. Do you have a copy of that?  
 9 A. I don't currently in my possession.  
 10 MR. JOYCE: I do. Do you want what  
 11 I sent to him, Heather?  
 12 MS. GAMACHE: Yes, that would be  
 13 great.  
 14 MR. JOYCE: I sent two. I sent him  
 15 the actual trackman.  
 16 MS. GAMACHE: Yeah, I'm going to  
 17 mark them as exhibits. We can mark them  
 18 as Exhibit 5.  
 19  
 20 (Exhibit 5, CSX Job Description,  
 21 2 pgs., Marked.)  
 22  
 23 Q. (By Ms. Gamache) Take a look at  
 24 those, and let me know if those are the

Page 12

1 Q. Okay. And what did you review to  
 2 prepare your report?  
 3 A. Mr. Crowther's office notes from  
 4 New England Orthopedics, his x-rays, his CT  
 5 scan, and my operative reports from his  
 6 subsequent surgery.  
 7 Q. When you say his New England  
 8 Orthopedic Surgeons, is that correct?  
 9 A. Correct, Surgeons.  
 10 Q. Office notes, those are his entire  
 11 record from the office, including the other  
 12 treating physicians?  
 13 A. I reviewed the records regarding  
 14 his left elbow. He was originally seen by  
 15 Dr. Wenner, subsequently, I believe, by  
 16 Dr. Adler, and then referred on to myself for  
 17 final treatment of his left elbow.  
 18 Q. So the records related to the left  
 19 elbow, but not necessarily the records related  
 20 to his other conditions?  
 21 A. I am aware of his other surgeries  
 22 and services provided here, but I did not study  
 23 them.  
 24 Q. Okay. Did you review any documents

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1 documents you reviewed.  
 2 A. (Doctor looks over documents.)  
 3 Yes, these are what I reviewed when preparing  
 4 his narrative report.  
 5 Q. Do you mind if I take a look at  
 6 them real quick.  
 7 Other than the medical records from  
 8 your office, the entire NEOS office, did you  
 9 review any outside medical records?  
 10 A. No.  
 11 Q. And other than the two documents  
 12 provided to you by Mr. Joyce, the CSX Position  
 13 Information document, did you review any other  
 14 documents related to Mr. Crowther's job duties?  
 15 A. No.  
 16 Q. Did you have any conversations with  
 17 Mr. Crowther regarding his job duties?  
 18 A. Not that I recall.  
 19 Q. So you don't recall discussing his  
 20 job with him while you were treating him?  
 21 A. We did in terms of his abilities to  
 22 return to work after the fact. I don't recall  
 23 any specific other descriptions or conversations  
 24 regarding his job duties, and how they would

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1 pertain to his left elbow.

2 Q. When you say after the fact, are  
3 you referring to after the surgery, his left  
4 elbow surgery?

5 A. No. When we first treated him,  
6 when I first treated him in 2007, we did  
7 describe how his left elbow pain was associated  
8 with, or at least brought upon by his working,  
9 i.e., when he worked, he would have elbow pain.  
10 And after his elbow surgery, we did discuss how  
11 it might impact his ability to return to work.

12 Q. Okay. And so am I correct that you  
13 don't recall having any conversations with him  
14 regarding tools that he used, or the way in  
15 which he held the tools, or anything of that  
16 nature?

17 A. I don't recall.

18 Q. Okay. Did you rely on any  
19 literature in reaching your opinion that's in  
20 the narrative report?

21 A. In my -- the literature I reviewed  
22 for my general education and how I provide  
23 orthopedic services, but not specifically an  
24 article directly related to Mr. Crowther's

Page 14

1 There was a description of swinging a hammer,  
2 using tie bars. I'm not sure where I remember  
3 that from. If I can just review this.

4 Q. Sure. Take a moment.

5 A. (Doctor looks over document.)

6 I mean, it's repetitive use of his left upper  
7 extremity often with very heavy loads, and  
8 again, the repetitive nature, that's the most  
9 important.

10 Q. The repetitive nature of using any  
11 specific tool or?

12 A. Any specific tool can lead to  
13 degenerative change, but it's the heavy  
14 unloading, loading, track materials, cutting  
15 rails, aligning tie plates, repairing and  
16 adjusting track switches, you know, cutting the  
17 brush from the vegetation for the right of way.  
18 I mean, all that involves repetitive, and my  
19 understanding, heavy work, manual labor.

20 Q. And further down in the same  
21 paragraph, you say -- you indicate, "To a  
22 reasonable degree of medical certainty, I  
23 believe that Mr. Crowther's work habits as  
24 described to me, and available from description

Page 16

1 elbow.

2 Q. Thank you. I just want to refer to  
3 your report a minute. I'm going to ask you some  
4 specific questions about your opinion.

5 On the second page, the first or  
6 second paragraph, you say you have had the  
7 opportunity to review the work requirements of  
8 Mr. Crowther's job at CSX. "I believe that  
9 Mr. Crowther's repetitive use of his left upper  
10 extremity, including lifting, carrying,  
11 hammering, etc., is in fact a direct cause if  
12 not an exacerbating feature of the development  
13 of left elbow degenerative osteoarthropathy."

14 Did I say that correctly?

15 A. Yes.

16 Q. If you want to take a look at these  
17 again, what specifically are you referring to  
18 when you say work requirements? I mean, you  
19 have etc. on there, so lifting, carrying,  
20 hammering, etc. What would be the etc.?

21 A. Well, I mean, the description of  
22 his job that includes drilling holes through  
23 rails, inserting and tightening loose bolts.  
24 There's also a description of manual labor.

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1 by CSX Industries, would in fact increase the  
2 likelihood that Mr. Crowther would develop  
3 degenerative osteoarthropathy of his left elbow  
4 and result in mechanical symptoms associated  
5 with loose bodies."

6 When you refer to work habits, what  
7 are you referring to, that is different from his  
8 work requirements? How is habit different than  
9 requirement?

10 A. I don't believe that they are.  
11 Different choice of words.

12 Q. So you're using habit and  
13 requirement synonymously?

14 A. Yes.

15 Q. Okay. And you testified earlier  
16 that you did not speak, or you don't recall a  
17 specific conversation with Mr. Crowther  
18 regarding work habits?

19 A. I don't recall a specific  
20 conversation, no.

21 Q. Okay. So in preparing your  
22 narrative, you didn't speak to Mr. Crowther  
23 beforehand in preparation to prepare the  
24 narrative?

Page 17

1 A. No.  
 2 Q. Is it your opinion that  
 3 Mr. Crowther's work, his normal every day work  
 4 on the railroad could cause or contribute to the  
 5 degenerative changes that he was suffering from  
 6 in his left elbow?

7 A. It is.

8 Q. You have not given an opinion, am I  
 9 correct, whether or not anything separate and  
 10 aside from those daily work habits -- I'm sorry,  
 11 let me rephrase that.

12 Would you agree that any activity  
 13 could, any repetitive activity at work could  
 14 cause the degenerative condition that he was  
 15 suffering from?

16 A. I think any repetitive work could  
 17 increase the likelihood of developing arthritis,  
 18 yes.

19 Q. So you have not provided an opinion  
 20 regarding whether there was something -- whether  
 21 the position, he was holding something, or the  
 22 specific work that he was doing, whether there  
 23 was anything wrong with it, just simply that he  
 24 was doing it?

Page 18

1 A. Overhead throwing for many years is  
 2 a prime cause of degenerative change. Frankly,  
 3 any repetitive use of a limb can lead to  
 4 degenerative arthritis.

5 Q. Is age a factor?

6 A. Age is not the sole cause of  
 7 degenerative change, but as we age, the  
 8 likelihood of seeing arthritis increases.

9 Q. Okay. Genetics, is that ever a  
 10 factor?

11 A. It appears to be. Not yet proven.

12 Q. You've also given an opinion that  
 13 Mr. Crowther's employment or employment  
 14 activities exacerbated his degenerative changes.  
 15 What do you mean by exacerbated?

16 A. I mean, likely led to an  
 17 acceleration of degenerative arthritis  
 18 developing.

19 Q. Is it your opinion that  
 20 Mr. Crowther's condition would have developed  
 21 more quickly if he continued to work beyond the  
 22 date that he stopped working?

23 A. If he were continuing to engage in  
 24 repetitive behaviors as described in the CSX

Page 20

1 A. Correct.  
 2 Q. So you have not given an opinion  
 3 regarding whether CSX could have done something  
 4 differently to prevent Mr. Crowther from  
 5 developing a degenerative condition?

6 MR. JOYCE: Dr. Luber is not our  
 7 liability expert, he's simply a medical  
 8 causation expert, so we're not offering an  
 9 unsafe work place, if that's what you  
 10 mean.

11 MS. GAMACHE: I understand. I'm  
 12 just confirming that he's not providing an  
 13 opinion, he's simply saying the repetitive  
 14 activity at work caused or at least  
 15 contributed to the degenerative changes.

16 MR. JOYCE: Okay.

17 MS. GAMACHE: Is that correct?

18 THE WITNESS: Correct.

19 Q. (By Ms. Gamache) Would you agree  
 20 that there are other activities can cause  
 21 degenerative changes in the elbow?

22 A. Yes.

23 Q. What types of activities can cause  
 24 degenerative changes?

Page 19

1 documents I reviewed, I would have expected his  
 2 arthritis to have increased after the period of  
 3 time he stopped working.

4 Q. Would you agree that any activity  
 5 can exacerbate degenerative changes, any  
 6 repetitive activity with your arm?

7 A. Any repetitive activity,  
 8 particularly heavy activity, can increase and  
 9 accelerate it, yes.

10 Q. But any activity, it doesn't  
 11 necessarily have to be heavy?

12 A. While not statistically proven,  
 13 there does appear to be an increased rate of the  
 14 development of arthritis in heavier activity as  
 15 opposed to lighter activities done repetitively,  
 16 such as clerical work.

17 Q. What about activities that are not  
 18 related to work, such as leisure activities?

19 A. As I mentioned, yes, baseball  
 20 players seem to have an increased risk of  
 21 degenerative elbow conditions.

22 Q. Would activities such as swimming  
 23 increase the chance of degenerative -- or  
 24 exacerbate degenerative changes in the elbow?

Page 21

1 A. I have not seen that personally or  
2 described in the literature.  
3 Q. How about fly fishing?  
4 A. Fly fishing is in some degree  
5 repetitive with casting. It would depend upon  
6 which arm, I guess, you casted with.  
7 Q. And I'm not sure if it's in your  
8 record -- it's probably somewhere in your  
9 records that Mr. Crowther is right hand  
10 dominant, correct?  
11 A. I'd have to review my records. If  
12 that is accurate, I don't know that.  
13 Q. I can represent to you that he's  
14 right hand dominant.  
15 A. Fine.  
16 Q. And this injury was his left  
17 elbow, correct?  
18 A. Correct.  
19 Q. Is there -- do you have any  
20 objective scientific evidence that  
21 Mr. Crowther's work activities were exacerbated  
22 by -- oh, I'm sorry, Mr. Crowther's elbow  
23 disease process was exacerbated by his work  
24 activities?

Page 22

1 MR. JOYCE: Objection. You can  
2 answer.  
3 THE WITNESS: Not necessarily,  
4 because those are tendonopathies, which  
5 are different from mechanical locking  
6 episodes associated with arthritis, which  
7 is what I treated him for.  
8 Q. (By Ms. Gamache) Is it possible  
9 that he was experiencing degenerative changes in  
10 2002 and suffering pain from them at the same  
11 time he was presenting -- I mean, he was  
12 presenting for pain in 2002, and ultimately  
13 diagnosed with the conditions I just spoke  
14 about. Is it possible that he was also  
15 suffering from degenerative changes in 2002?  
16 MR. JOYCE: Objection.  
17 THE WITNESS: It is possible, but I  
18 did not treat him for it, nor did I exam  
19 him, so I can't speak to accuracy of the  
20 physician who made that diagnosis in 2002.  
21 Q. (By Ms. Gamache) Okay. Is medial  
22 epicondylitis in any way indicative of  
23 degenerative changes?  
24 A. No.

Page 24

1 A. No.  
2 Q. Do you have an opinion regarding  
3 when Mr. Crowther became symptomatic, when his  
4 left elbow became symptomatic?  
5 A. He first complaint of it to  
6 Dr. Wenner, who was treating him for or seeing  
7 him for his hand, I believe in 2006 or 2007.  
8 He was referred to me in 2007. That was the  
9 first knowledge I had of his complaints.  
10 Q. In general, in your opinion, when  
11 does a patient become symptomatic?  
12 A. Well, I mean, I would relate being  
13 symptomatic to having enough complaints to seek  
14 out medical care for.  
15 Q. Were you aware of Mr. Crowther  
16 seeking out medical attention prior to 2006?  
17 A. I am not.  
18 Q. If I represent to you that  
19 Mr. Crowther sought medical attention in 2002  
20 for elbow pain, and was diagnosed with bilateral  
21 medial epicondylitis, as well as tennis elbow  
22 and cubital tunnel, would that change when you  
23 believe he became symptomatic for the disease  
24 process in his left elbow?

Page 23

1 Q. Is Cubital Tunnel Syndrome in any  
2 way indicative of degenerative changes?  
3 A. Not necessarily.  
4 Q. In what way would it be indicative  
5 of degenerative changes?  
6 A. There is a condition called Tardy  
7 Ulnar Nerve Palsy, which is Cubital Tunnel  
8 Syndrome, which develops years after a  
9 fracture. It usually is associated with  
10 significant loss of motion. But those are  
11 different than Mr. Crowther's elbow, which had  
12 range of motion with mechanical locking  
13 episodes, so different disease process.  
14 Q. Have you treated other railroad  
15 workers with a similar condition?  
16 A. I have not.  
17 Q. Is the degenerative condition that  
18 Mr. Crowther suffers from in his left elbow, is  
19 that a common condition?  
20 A. Elbow arthritis is relatively  
21 uncommon.  
22 Q. Do you treat other railroad  
23 workers, in general?  
24 A. I have seen other railroad

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1 workers. I don't have a large percentage of  
 2 them in my practice.  
 3 Q. The ones that you have seen, do you  
 4 know whether they have the same position or type  
 5 of position that Mr. Crowther had?  
 6 A. I do not know that for a fact.  
 7 Q. Okay. Is there any way to  
 8 determine the actual cause of the degenerative  
 9 condition?  
 10 A. No, not to my knowledge. Could I  
 11 rephrase that?  
 12 Q. Sure.  
 13 A. It is more likely that you will  
 14 develop degenerative change after an  
 15 intra-articular fracture. So if we have a  
 16 fracture in the knee, it's more likely to  
 17 develop degenerative change later, but it's a  
 18 different condition, so.  
 19 Q. Are you aware of Mr. Crowther  
 20 suffering from any intra-articular fracture in  
 21 any way?  
 22 A. Not that I'm aware of.  
 23 Q. So to diagnose a degenerative  
 24 condition, you would assess symptoms, and then

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1 that I have in front of me.  
 2 MS. GAMACHE: Then we'll that as an  
 3 exhibit, as well.  
 4  
 5 (Exhibit 6, Office Note, 2/26/07,  
 6 Marked.)  
 7  
 8 Q. (By Ms. Gamache) Now, referring  
 9 back to what was marked as Exhibit 6, is that  
 10 your office note dated February 26th, 2007?  
 11 A. It is.  
 12 Q. In your office note, it indicates  
 13 in the first paragraph, "Since he has been  
 14 relatively inactive, his left elbow has become  
 15 relatively asymptomatic for him;" is that  
 16 correct?  
 17 A. Yes.  
 18 Q. So at the time you saw him -- at  
 19 the time that you saw Mr. Crowther, was he --  
 20 what were his symptoms, if you've written  
 21 relatively asymptomatic?  
 22 A. He was really having little or no  
 23 symptoms, because, again, recent surgery with  
 24 Dr. Cowan and separately with Dr. Wenner, he

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1 conduct tests, and make a diagnosis; is that  
 2 generally --  
 3 A. Yes.  
 4 Q. I'm going to refer to a couple  
 5 medical records, they're probably in your  
 6 notes. You indicated that you first saw  
 7 Mr. Crowther -- or actually, I'm not sure if we  
 8 covered exactly when you saw him. You said in  
 9 2007, if I'm correct. Do you recall that being  
 10 when you initially saw Mr. Crowther?  
 11 A. I believe that was the first  
 12 referral to me. I actually do not have that  
 13 office note in front of me.  
 14 Q. Okay. I can give you one.  
 15 MR. JOYCE: This is February 26th,  
 16 2007?  
 17 MS. GAMACHE: Yes. You can ignore  
 18 my highlighting.  
 19 Q. (By Ms. Gamache) Take a moment  
 20 and look at the note.  
 21 A. Thank you.  
 22 Q. That's not included in the packet  
 23 you have?  
 24 A. It's not included in the packet

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1 hadn't been using his arm very much.  
 2 Q. And that, based on the records, was  
 3 the first time that you saw --  
 4 A. That was the first time I was asked  
 5 to see him, yes.  
 6 Q. Okay. Do you recall, at any point  
 7 after seeing Mr. Crowther for the first time on  
 8 February 26th, 2007, his condition worsening,  
 9 his left elbow condition?  
 10 A. Not until he returned to me in, I  
 11 believe it was 2009, when he was experiencing  
 12 more mechanical episodes in his left elbow.  
 13 Q. Would you consider that to be an  
 14 aggravation or exacerbation of his condition  
 15 from when you saw him on February 26th, 2007?  
 16 A. Yes. As I outlined in that  
 17 original note, the reason to do surgery would be  
 18 based upon whether or not he was having  
 19 mechanical locking episodes.  
 20 Q. I'm going to refer you to a note  
 21 dated March 19th, 2007.  
 22 A. I don't have that, as well.  
 23 Q. Okay. That's fine.  
 24 A. (Doctor looks over document.)

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1 MS. GAMACHE: That will be  
 2 Exhibit 7.  
 3

4 (Exhibit 7, Office Note, 3/19/07,  
 5 Marked.)  
 6

7 Q. (By Ms. Gamache) And again, in  
 8 this note, March 19th, 2007, you indicate,  
 9 "Today, he has relatively few symptoms because,  
 10 again, his work habits have changed," correct?  
 11 A. Yes.

12 Q. Would you agree that similar to  
 13 February 26, 2007, at the time you saw him on  
 14 March 19th, 2007, he was asymptomatic?

15 A. Yes. The main reason for his visit  
 16 was to follow-up on his CT scan that I had  
 17 ordered. Could I clarify an error I see in my  
 18 note?

19 Q. Sure.

20 A. In the "Impression," I list left  
 21 knee loose bodies, and left knee capitellar, and  
 22 that should be elbow.

23 Q. Okay. I was going to ask you that,  
 24 actually. Thank you.

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1 had bilateral total knee arthroplasty with  
 2 Dr. Laymen. I never treated him for his knee.  
 3 Q. Okay. Although that's in one  
 4 sentence, when you say he has been having  
 5 ongoing mechanical symptoms and discomfort, are  
 6 you referring, then, to his knee or his elbow?  
 7 A. To his elbow.

8 Q. And I believe you testified earlier  
 9 that that would be -- that based on the times  
 10 you saw him in February of 2007 and March of  
 11 2007, that in January of 2009, he is no longer  
 12 asymptomatic, and is now --

13 A. Having symptoms.

14 Q. -- having symptoms?

15 A. That has brought him back to seek  
 16 care, yes.

17 Q. And I believe you testified that  
 18 that was an aggravation of his condition?

19 A. At least his symptoms were enough  
 20 that he cycled back to seek care again regarding  
 21 his left elbow.

22 Q. If I represent to you that  
 23 Mr. Crowther did not work at all between when  
 24 you saw saw him in 2007 to 2009, is it safe to

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1 MR. JOYCE: You didn't treat him  
 2 for his left knee, right, Doctor?

3 THE WITNESS: I did not. That was  
 4 an error.

5 Q. (By Ms. Gamache) And now I'm going  
 6 to refer you to a note dated January 19th, 2009,  
 7 which I believe, based on the records, is the  
 8 next visit you had with Mr. Crowther, which is  
 9 22 months later.

10 A. Yes. And again, I said knee, it is  
 11 elbow. I apologize for that.

12 Q. Okay. In both places? It's also  
 13 in the second paragraph?

14 A. Yes. It is always his elbow.

15 Q. So if, in the records, it says  
 16 Dr. Luber and relates to the knee, is it safe to  
 17 presume that you're referring to the elbow?

18 A. I am sorry to admit this, that it  
 19 is safe to assume that I spoke in error.

20 Q. In this record, you indicate, "He  
 21 has been having ongoing mechanical symptoms and  
 22 discomfort as he is recovering from bilateral  
 23 total -- which says knee, but should be elbow --

24 A. No, I'm sorry. So he has recently

1 state that conditions, other than his work, were  
 2 aggravating his condition?

3 MR. JOYCE: Objection.

4 THE WITNESS: I'm answering?

5 MR. JOYCE: Yes.

6 THE WITNESS: Other things may have  
 7 exacerbated his elbow at that time, yes.

8 Q. (By Ms. Gamache) I'm going to  
 9 refer you back to the February 26th, 2007  
 10 record.

11 A. Yes.

12 Q. That was the first day that you  
 13 that treated Mr. Crowther. On that date, based  
 14 on the elbow -- based on the condition of the  
 15 elbow, would you have considered him unable to  
 16 work, simply referring to the elbow condition,  
 17 not any other condition he was suffering from?

18 A. That question wasn't posed to me at  
 19 that time. I would have assumed that he could  
 20 be able to work, given the way his elbow  
 21 appeared on that date.

22 Q. Okay. And based on his condition  
 23 on that date, would you have considered him able  
 24 to work at full capacity?

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1 A. Well, that's difficult to  
 2 determine, because I don't know how symptomatic  
 3 he would have been were he working at full  
 4 capacity; meaning, that in an inactive state, he  
 5 was not complaining of elbow pain, but if he  
 6 were at work full duty, would his elbow have  
 7 been worse? I don't have that answer.

8 Q. At any point, when you were  
 9 treating Mr. Crowther, did you give him an  
 10 opinion regarding whether or not he could work  
 11 based on the condition of his elbow?

12 A. I don't recall doing so. I don't  
 13 know if there are records to indicate a work  
 14 note regarding his left elbow during my course  
 15 of treatment with him.

16 Q. Okay. I'm going to refer to,  
 17 again, back to the February 26th, 2007 record.  
 18 On the second sentence, it states, "He has had  
 19 complaints of left elbow pain and some  
 20 mechanical symptoms for the past several years."  
 21 Would Mr. Crowther have provided that  
 22 information to you?

23 A. That would be the likely source of  
 24 that, if it's in that section of the note, which

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1 Q. So you didn't speak to him or  
 2 assess any percentage, if he's doing manual  
 3 work, this percentage of time versus resting it  
 4 percentage of the time?

5 A. I did not.

6 Q. Have you ever visited a job site  
 7 where individuals doing what Mr. Crowther did in  
 8 his work duties were doing?

9 A. No.

10 Q. Also looking at your report, on the  
 11 second page, in the second to last paragraph,  
 12 you indicate, "At this time, I believe that to a  
 13 reasonable degree of medical certainty that  
 14 Mr. Crowther's left elbow injury was exacerbated  
 15 and aggravated, and at least partially caused by  
 16 his work history at CSX Transportation."

17 What other causes, in your opinion  
 18 -- or I'm sorry, what else, other than his work,  
 19 caused his degenerative condition?

20 A. Without certain knowledge, but  
 21 there is a suggestion in his original CT scan  
 22 that he might have had an old osteochondritis  
 23 dissecans lesion on his capitellum.

24 Q. And can you tell, based -- I'm

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1 is related to what the patient tells me upon  
 2 arrival

3 Q. Okay. And that's information that  
 4 you take down, or someone else takes down?

5 A. That I take down.

6 Q. Okay. And when you say past  
 7 several years, is that more than one year?

8 A. It is certainly non-specific, but  
 9 it would be more than one year.

10 Q. Is it more than two years?

11 A. I don't know. Several would  
 12 usually mean more than two.

13 MS. GAMACHE: Okay. I'm going to  
 14 take a minute and review any notes, Tom.

15 MR. JOYCE: Sure.

16 Q. (By Ms. Gamache) Going back to  
 17 when you prepared your narrative report, you  
 18 indicated that you referred to what's been  
 19 marked as Exhibit 5, which were job  
 20 descriptions. Did you assess any activity  
 21 versus rest period, as far as manual labor, and  
 22 how Mr. Crowther's job duties would have caused  
 23 or contributed to his degenerative condition?

24 A. No.

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1 sorry, you said it was a CT scan, correct?

2 A. Correct.

3 Q. Based on the CT scan, is it  
 4 possible to determine how long it had been  
 5 there?

6 A. No, but they generally develop in  
 7 adolescence.

8 Q. And what is it, if you can say it  
 9 again?

10 A. Osteochondritis Dissecans.

11 Q. OCD is how it is commonly referred  
 12 to?

13 A. Correct.

14 Q. And what is OCD?

15 A. It is a poorly understood injury to  
 16 the blood supply of a growth plate that leads to  
 17 a disruption of that blood supply, and then a  
 18 resulting injury to the underlying bone that  
 19 supports the cartilage.

20 Q. I'm going to refer you to the CT of  
 21 the left elbow dated March 8th, 2007.

22 MS. GAMACHE: We can mark that as  
 23 exhibit --

24 THE WITNESS: It's in my file.

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1 MS. GAMACHE: Oh, it's in your  
 2 file. We don't need to mark it as an  
 3 exhibit, then.  
 4 Q. (By Ms. Gamache) And the OCD that  
 5 you're referring to was visible on the CT scan,  
 6 correct?  
 7 A. Correct.  
 8 Q. Okay.  
 9 A. Well, it can't be confirmed to be  
 10 an OCD lesion, but that is the most likely  
 11 diagnosis that would be associated with the  
 12 radiographic abnormalities seen on the CT scan.  
 13 Q. And it's possible that the OCD  
 14 caused Mr. Crowther's degenerative condition?  
 15 MR. JOYCE: Objection.  
 16 THE WITNESS: It is possible that  
 17 the OCD lesion was a contributing factor  
 18 to his development of arthritis.  
 19 Q. (By Ms. Gamache) Is there any way  
 20 to determine whether one contributing factor,  
 21 whether it's the OCD or Mr. Crowther's job  
 22 duties, caused or contributed more to the  
 23 development of his degenerative condition?  
 24 MR. JOYCE: Objection.

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1 condition, it develops over time?  
 2 A. Correct.  
 3 Q. Is there any way to determine,  
 4 based on the CT or any other type of test, how  
 5 long those loose bodies or spurs were present in  
 6 Mr. Crowther's elbow?  
 7 A. No, other than following serial  
 8 radiographs.  
 9 Q. Did you have any other scans, other  
 10 than this one, which was taken on March 8th,  
 11 2007?  
 12 A. No. Dr. Wenner, I believe,  
 13 obtained the original elbow x-rays, which led to  
 14 his referral the year before that, or at some  
 15 point prior to that 2007 CT scan.  
 16 Q. And would the x-ray provide the  
 17 same information that the CT scan would?  
 18 A. Yes, but in less detail.  
 19 Q. Other than the OCD, are there any  
 20 other factors which could have caused or  
 21 contributed to Mr. Crowther's degenerative  
 22 condition?  
 23 A. I don't understand the question.  
 24 Q. In your opinion, you've opined in

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1 THE WITNESS: I don't believe  
 2 that's possible.  
 3 Q. (By Ms. Gamache) I'm going to  
 4 refer you again to the CT scan. What, in  
 5 addition to OCD, did the CT scan reveal?  
 6 A. Again, degenerative spurring, and  
 7 multiple intra-articular loose bodies.  
 8 Q. If you don't mind, explain briefly  
 9 what spurring is.  
 10 A. In any joint that is undergoing  
 11 osteoarthritic change, and therefore, the loss  
 12 of cartilage on the end of the joint surfaces,  
 13 the most common response in the body is to make  
 14 osteophytes or bone spurs at the margins or  
 15 edges of those joints. In the elbow, those bone  
 16 spurs often cause limited range of motion.  
 17 Q. And then loose bodies?  
 18 A. Loose bodies are found in a joint  
 19 for various reasons, but most commonly during  
 20 the development of degenerative arthritis,  
 21 pieces of cartilage are damaged or flaked off or  
 22 loosened, and they grow over time, much like a  
 23 pearl does, and get larger.  
 24 Q. So this type of arthritic

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1 your narrative report that Mr. Crowther's work  
 2 activities contributed or caused his  
 3 degenerative condition, and you've also just  
 4 testified that the OCD could have caused or  
 5 contributed to his condition in his left elbow.  
 6 Is it your opinion that any -- that  
 7 there is another potential cause of the  
 8 condition in his elbow?  
 9 A. I believe that his osteochondritis  
 10 dissecans was a contributing factor that was  
 11 exacerbated by the repetitive use of his arm,  
 12 inactivities, particularly the work activities  
 13 that I was provided with.  
 14 Q. Could Mr. Crowther have developed  
 15 this type of degenerative condition without  
 16 having performed manual labor?  
 17 A. Possibly.  
 18 Q. Is there any way to determine --  
 19 strike that.  
 20 Is it possible for the OCD lesion  
 21 to have caused Mr. Crowther pain over the course  
 22 of its development?  
 23 A. They are often asymptomatic, and  
 24 they're only brought to our attention

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1 theoretically years after they've develop, but  
 2 they do occasionally cause symptoms early on in  
 3 their development.

4 Q. And what type of symptoms would  
 5 show up?

6 A. They can cause pain, they can cause  
 7 swelling. If they are generating loose pieces,  
 8 they can cause mechanical locking episodes.

9 Q. So the OCD could also have caused  
 10 the loose bodies?

11 MR. JOYCE: Objection.

12 THE WITNESS: It's possible.

13 Q. (By Ms. Gamache) Could the OCD  
 14 lesion have caused the spurring?

15 A. Again, an OCD lesion is an injury  
 16 to the bone and cartilage. The end result of  
 17 that can be arthritis, and the spurs develop in  
 18 response to that arthritis.

19 Q. And am I correct that there's no  
 20 way to determine whether the OCD or  
 21 Mr. Crowther's job duties actually caused his  
 22 degenerative condition?

23 MR. JOYCE: Objection.

24 THE WITNESS: There's no way to say

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1 Q. Okay. He could return to the job  
 2 duties that he was performing prior to the  
 3 surgery, or prior to stopping work?

4 A. That's what I would have attempted.  
 5 Now, after returning to that job, would he have  
 6 had symptoms enough to come back and have new  
 7 complaints, I don't know the answer to that, but  
 8 I would have tried to return him to his previous  
 9 job.

10 Q. Okay. So in your opinion,  
 11 Mr. Crowther's surgery was successful?

12 A. I believe so.

13 Q. Have you treated Mr. Crowther since  
 14 then?

15 A. I have.

16 Q. For his elbow?

17 A. No.

18 Q. Okay. Do you know if Mr. Crowther  
 19 has sought any treatment for his elbow following  
 20 your surgery?

21 A. I don't know the answer. He has  
 22 never asked me about it, or complained to me  
 23 about his elbow.

24 Q. Okay. Referring again to your

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1 for absolute certainty.

2 Q. (By Ms. Gamache) And given that  
 3 Mr. Crowther had an OCD lesion, or an OCD lesion  
 4 was on the CT scan, it's possible that  
 5 Mr. Crowther could have developed this  
 6 degenerative condition having never done any  
 7 manual labor; is that correct?

8 A. He could have. It appears that  
 9 these types of injuries are made worse or  
 10 accelerated by repetitive use.

11 Q. But he could have developed the  
 12 arthritic condition in his elbow having not done  
 13 the job duties that he did with the railroad?

14 A. It is possible.

15 Q. Okay. In your opinion, based  
 16 simply on Mr. Crowther's elbow condition, could  
 17 he have returned to work after the surgery in  
 18 2009?

19 A. In large, it could have been  
 20 dependent upon what type of job he was returning  
 21 to. Based upon his outcome from the surgery,  
 22 and those job descriptions, I believe he could  
 23 have returned to work based upon his elbow  
 24 alone.

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1 record dated January 19th, 2009.

2 A. Yes.

3 Q. In the "Impression" section of that  
 4 note, you indicate, "We discussed whether or not  
 5 we could manage his symptoms with an  
 6 intra-articular injection, which may be  
 7 temporary, but might be helpful."

8 A. Yes.

9 Q. In your opinion, could he have  
 10 obtained the same results having not undergone  
 11 surgery?

12 A. No.

13 Q. What results may he have obtained  
 14 without undergoing surgery?

15 A. Well, associated with his arthritis,  
 16 there's often swelling and discomfort, and an  
 17 intra-articular injection can temporarily  
 18 relieve those symptoms. It would not have  
 19 eliminated any mechanical symptoms associated  
 20 with the loose bodies, or eliminated those to  
 21 remove them.

22 Q. And if you can, is it your  
 23 understanding that the mechanical symptoms or  
 24 the discomfort, if one or the other was more the

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1 issue for Mr. Crowther?  
 2 A. I believe that the mechanical  
 3 symptoms were the bigger complaint for him.  
 4 Q. And the mechanical symptoms were a  
 5 result of the loose bodies?  
 6 A. Yes.  
 7 Q. And the loose bodies, is that also  
 8 a degenerative condition?  
 9 A. Loose bodies are not always present  
 10 in degenerative arthritis, but they are often a  
 11 component of it, yes.  
 12 Q. Is it possible to have loose  
 13 bodies and not have a degenerative condition?  
 14 A. Theoretically, I don't know whether  
 15 I've ever seen one without the other.  
 16 Q. And other than non-use, is there  
 17 any way to prevent degenerative conditions?  
 18 A. No.  
 19 Q. So it's possible that anyone can  
 20 develop a degenerative condition in their elbow?  
 21 A. It is possible. Again, elbow  
 22 arthritis is relatively uncommon.  
 23 MS. GAMACHE: I think that's all I  
 24 have.

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1 CERTIFICATE OF COURT REPORTER  
 2 I, Michele L. Mariani, Certified Shorthand  
 3 Reporter, do certify that the deposition of  
 4 DR. MARTIN J. LUBER, in the matter of CROWTHER  
 5 V. CSX TRANSPORTATION, ET AL., on the 24th day  
 6 of May, 2010, was stenographically recorded by  
 7 me; that the witness provided satisfactory  
 8 evidence of identification, as prescribed by  
 9 Executive Order 455 (03-13) issued by the  
 10 Governor of the Commonwealth of Massachusetts,  
 11 before being sworn by me, a Notary Public in and  
 12 for the Commonwealth of Massachusetts; that the  
 13 transcript produced by me is a true and accurate  
 14 record of the proceedings to the best of my  
 15 ability; that I am neither counsel for, related  
 16 to, nor employed by any of the parties to the  
 17 above action; and further, that I am not a  
 18 relative or employee of any attorney or counsel  
 19 employed by the parties thereto, nor financially  
 20 or otherwise interested in the outcome of the  
 21 action.

22  
23 MAY 26, 2010 \_\_\_\_\_

24 Michele L. Mariani, CSR

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1 MR. JOYCE: That's it, Dr. Luber,  
 2 you're all done.  
 3 MS. GAMACHE: Thank you,  
 4 Dr. Luber.  
 5  
 6 (Deposition concluded at 6:25 p.m.)  
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